Supreme Court, U.S.
FILED
MAY 11 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1415

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES E. LINDSEY, *et al.*,
Petitioners,

v.

FERRIS FACULTY ASSOCIATION-MEA-NEA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Court of Appeals erred when it concluded, based on the factual findings of the District Court, that the financial information sent to nonmember employees prior to the collection of service (*i.e.*, agency) fees—which included lists of the major categories of respondent unions' expenses that were verified by an independent auditor and identified which of those expenses were legally chargeable and legally nonchargeable to objecting nonmember employees—satisfies the footnote reference in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 307 n.18 (1986), to "verification by an independent auditor."

II. Whether the Court of Appeals erred when it concluded that the decision of respondent unions to use the American Arbitration Association to select an arbitrator to hear challenges by objecting nonmember employees to the amount of the service fee satisfies the requirement of *Hudson*, 475 U.S. at 308 n.21, 310, that such employees be provided with an "opportunity to challenge the amount of the fee before an impartial decisionmaker" whose "selection [does] not represent the Union's unrestricted choice."

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Ferris Faculty Association-MEA-NEA, Michigan Education Association, and National Education Association file this brief in opposition to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. The Background Facts

Petitioners are three faculty members at Ferris State College, a public institution of higher education in Michigan. Since at least 1975, the Ferris Faculty Association-MEA-NEA ("FFA")—a local affiliate of the Michigan Education Association ("MEA") at the state level and the National Education Association ("NEA") at the national level—has been recognized as the exclusive representative for a bargaining unit consisting of all faculty

at the college.[1] Although petitioners are members of the bargaining unit represented by FFA, they have refused to join FFA or its affiliated state and national organizations.

In its capacity as exclusive representative, FFA has entered into a collective bargaining agreement with Ferris State College. As permitted by Michigan law—specifically, Mich. Comp. Laws § 423.210, *reprinted in* Appendix to Petition ("App.") at 119a—that collective bargaining agreement includes a service-fee provision, pursuant to which all employees in the bargaining unit who are not members of FFA ("nonmember employees") are required to pay a fee for services rendered by FFA and its affiliated organizations. In accordance with the collective bargaining agreement, the service fee charged to nonmember employees is "equivalent to the amount of dues uniformly required of members of [FFA], less any amounts not permitted by law." App. at 8a n.3.

To collect these service fees, the associations follow a procedure that was adopted by MEA to govern fee collections from all nonmember employees in Michigan who are covered by service-fee provisions involving one of MEA's affiliated local associations ("MEA Procedure").[2] Only two aspects of the MEA Procedure are being challenged by petitioners—namely, the sufficiency of the audited financial information included in the notice that is annually sent to nonmember employees, and the use of the American Arbitration Association ("AAA") to select the arbitrator who serves as the impartial decisionmaker to hear challenges to the amount of the fee. We therefore describe those aspects of the MEA Procedure in some detail.

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[1] For purposes of simplicity, FFA, MEA, and NEA are sometimes hereinafter referred to collectively as the "associations."

[2] A copy of the relevant MEA Procedure is included in the final opinion of the District Court. *See* App. at 111a-116a.

1. *The Notice Sent to Nonmember Employees*: By November 30 of each school year, the Executive Director of MEA is required to determine which expenditures of FFA (and other local associations collecting a local portion of the service fee), MEA, and NEA during the prior fiscal year are legally chargeable and legally nonchargeable to objecting nonmember employees. *See* App. at 111a. Based on this determination, the Executive Director calculates a reduced service fee that the associations believe an objecting nonmember employee may legally be required to pay. *See id.* In order to provide a "cushion" for disputed chargeable expenditures, the amount of the reduced service fee that actually is charged objecting nonmember employees is five dollars less than the amount calculated by the Executive Director. *Id.* at 112a.

The associations then provide all nonmember employees who are required to pay a service fee with "adequate information identifying the NEA's, MEA's and local associations' total expenditures [that is] sufficient to enable them to assess the propriety of the service fee calculation." *Id.* This information includes lists of expenditures made by NEA, MEA, and FFA that are broken down into major categories of expenses. *Id.* Independent auditors verify that the money in fact was expended in the manner indicated, and the associations provide "an identification of whether [each] major category of expense, or a particular portion thereof, is chargeable to objectors." *Id.* In addition, the information distributed to nonmember employees sets forth the amount of the reduced fee, explains the method used to calculate that reduced fee, and provides the nonmembers with a copy of the MEA Procedure. *Id.*

After receiving the information described above, each nonmember employee has a period of thirty days within which to file a written objection to the amount of the reduced service fee. *See* App. at 112a-113a. No nonmember is required to pay any portion of the fee until

the thirty-day period has expired. An objection may be in general terms, and a nonmember need not single out any particular expenditure nor specify any particular reason for his or her objection. Moreover, if a nonmember objects, the entire amount of his or her reduced service fee is placed in an interest-bearing escrow account until the impartial decisionmaker issues a decision on the exact proportion of the fee that is lawfully chargeable to objecting nonmember employees. *See* App. at 113a-114a.

2. *The Role Played by the AAA*: Within fifteen days of the deadline by which nonmembers must file written objections to the amount of the fee, the associations are required to contact the AAA and request it to appoint an arbitrator to serve as the impartial decisionmaker who will "determine the proportion of the [service] fee that is chargeable to non-members under applicable law." App. at 114a. The arbitrator is selected, and, with one exception, the hearing before the arbitrator is conducted, in accordance with the AAA Rules for Impartial Determination of Union Fees ("AAA Rules").[3] At this hearing, the burden is on the associations to prove the proportion of their expenditures that lawfully may be charged to objecting nonmember employees. AAA Rules at Explanation.

Of particular relevance to this appeal is Rule 4 of the AAA Rules, which prohibits an arbitrator from serving

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[3] The exception relates to the first sentence of Rule 19 of the AAA Rules, which allows the associations unilaterally to waive oral hearings before the arbitrator. The MEA Procedure does not provide for such a waiver, thereby complying with the decision of the Second Circuit in *Andrews v. Education Association of Cheshire*, 829 F.2d 335, 341 (2d Cir. 1987), which concluded that, with the exception of the waiver provision in Rule 19, the AAA Rules satisfy all constitutional requirements.

A complete version of the AAA Rules appears at several points in the record before the Court of Appeals. *See, e.g.*, Affidavit of Beverly J. Wolkow (March 15, 1988); Affidavit of Beverly J. Wolkow (April 18, 1988).

as the impartial decisionmaker if he or she cannot function in an unbiased manner. That rule specifically allows for the disqualification of an arbitrator by the AAA at two different points in the selection process: at the AAA's own initiative based on disclosures by the arbitrator prior to his or her accepting the appointment, and subsequent to the appointment based on a challenge initiated by any employee or association participating in the arbitration.[4]

B. The Decisions Below

1. *The District Court*: After a long and complex procedural history, the District Court issued a series of opinions in which it concluded that the MEA Procedure satisfied all constitutional requirements. *See* App. at 68a-85a, 86a-97a, 98a-116a. In those opinions, the court specifically rejected the arguments that petitioners now present to this Court. With regard to the auditing component of the MEA Procedure, the District Court stated:

> The independent auditor will verify the amount of expenditures that were made in both chargeable and

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[4] AAA Rule 4 provides as follows:

> *Disclosure of Grounds for Disqualification*—Prior to accepting the appointment, a prospective Arbitrator shall disclose any circumstances likely to cause a presumption of bias. In its discretion, the AAA may disqualify an Arbitrator based on such disclosure. After participants in the procedure are notified of any appointment, they may challenge an Arbitrator for cause by promptly notifying the AAA of their objection.

During the arbitration, each nonmember who has challenged the amount of the service fee is afforded a full opportunity to participate in the hearing. For example, each nonmember is entitled to be represented by counsel or other authorized representative, and to present evidence, including affidavits or live testimony from relevant witnesses, documents, and other exhibits. All participants also are entitled to examine whatever evidence is submitted to the arbitrator by other parties, and to submit written briefs after all such evidence is accumulated. In addition, throughout the hearing, the arbitrator is granted broad discretion in determining "how the case may best be presented so that all participants have a fair opportunity to contest the issues." *See* AAA Rules 7, 8, 12, 14, 15, 16.

> nonchargeable areas. It is clear that under the [associations'] procedures the auditor will not make the legal determination of which expenditures are chargeable or nonchargeable, but rather will only verify that the expenditures were actually made in the categories determined by the [associations] to be chargeable or nonchargeable. [App. at 73a.]
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> * * * *
>
> [Petitioners'] approach would have the auditor function as both "an auditor in the traditional sense and as the independent decision maker as to chargeable expenses." *Andrews*[*v. Education Association of Cheshire*], 829 F.2d at 340. My reading of *Hudson* . . . leads me to conclude that all that is required is that an independent auditor, at the audit stage, verify the union's *calculations* and *disbursements* which have been presented to the nonmember. [App. at 74a (emphasis in original).]

With regard to the MEA Procedure's use of the AAA to select an arbitrator to serve as the impartial decisionmaker, the District Court stated:

> *Hudson* noted "that an expeditious arbitration might satisfy the requirement of a reasonably prompt decision by an impartial decision maker, so long as the arbitrator's selection did not represent the union's unrestricted choice." [App. at 81a (quoting *Hudson*, 475 U.S. at 308 n.21).]
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> * * * *
>
> I am not persuaded that [petitioners'] affidavits have raised a material fact with respect to the issue of "actual and or apparent bias" of the AAA. . . . I find that the proposed use of the AAA comports with the impartiality requirement set forth in *Hudson*. [App. at 82a.]

2. *The Court of Appeals:* On appeal to the Sixth Circuit, petitioners again argued that the MEA Procedure failed to satisfy the standards set forth in *Hudson* with regard to the role of the independent auditor and the

selection of the impartial decisionmaker. The Court of Appeals summarily rejected both of these arguments based on prior decisions of the Sixth Circuit that already had applied the decision in *Hudson* in circumstances identical to the facts of this case.

Specifically, with regard to the independent auditor, the Court of Appeals referred to its recent decision in *Gwirtz v. Ohio Education Association*, 887 F.2d 678 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 1810 (1990), for the proposition that *Hudson* does "not require the independent auditor to make a determination of chargeability, which is essentially a legal determination." App. at 3a. The point was more fully explained by the court in *Gwirtz*, which reasoned as follows:

> On the question of "verification" by an auditor, we reject the plaintiffs' argument that the function of the independent auditor is to verify the union's calculation of the chargeable or nonchargeable nature of the major categories of union expenditures. Whether a union expenditure is "chargeable" or "nonchargeable" to nonmember employees is a *legal* determination that depends upon the type of union activity for which the expenditure is made. It is not the role of an auditor to make such a legal determination. Rather, an auditor's role is to verify the expenditures made by the union so as to ensure that the expenditures that the union claims it made for particular expenses were actually made for those expenses. *Andrews v. Education Association of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987). Because the audit performed by an independent auditor in this case did so verify the expenditures of the Association, we hold that the audit met the constitutional standards of *Hudson*. [887 F.2d at 682 n.3 (emphasis in original).]

In response to petitioners' second argument, the Court of Appeals cited *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987), in which the Sixth Circuit "rejected a claim of 'generalized bias' against the American Arbitration

Association and pointed out that the [AAA] Rules for Impartial Determination of Union Fees . . . contain several safeguards against bias or prejudice by an arbitrator." App. at 3a. Indeed, the court noted, "[i]f [petitioners] perceive a proposed or selected arbitrator as biased, these safeguards are available to them as a means of challenging the appointment." App. at 3a.

Having summarily rejected petitioners' specific arguments, the Court of Appeals ended its opinion by putting its approval of the MEA Procedure into the proper context:

> The complaint in this case was filed on May 22, 1978. The district court has given careful consideration to every argument put forward by [petitioners] and has required the union to "toe the line" in fashioning a process for imposition of service fees that fully meets the constitutional standards enunciated by the Supreme Court in *Hudson*. An examination of the record discloses a meticulous attention to detail by the district court and a result that satisfies *Hudson* as interpreted by our later decisions. [App. at 4a.]

REASONS FOR DENYING THE WRIT

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), this Court reaffirmed that it is constitutional for a public employer and a union serving as the exclusive bargaining representative "to require nonunion employees, as a condition of employment, to pay a fair share of the union's cost of negotiating and administering a collective-bargaining agreement." 475 U.S. at 301. At the same time, the Court recognized that the collection of service fees has the potential for infringing on the First Amendment rights of nonmember employees, and therefore concluded that an exclusive representative must meet certain procedural requirements when collecting such fees. The overall "objective," the Court indicated, is "to devise a way of preventing compulsory subsidiza-

tion of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." *Id.* at 302 (quoting *Abood v. Detroit Board of Education*, 431 U.S. 209, 237 (1977)).

The Court then affirmatively set forth certain requirements that a procedure for the collection of service fees must meet in order to pass constitutional muster, including "an adequate explanation of the basis for the fee [and] a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." 475 U.S. at 310.

In this case, petitioners raise two questions about the Court of Appeals' application of these requirements to the MEA Procedure. As we now demonstrate, however, neither of these questions warrant full consideration by this Court.

I. THE FINANCIAL INFORMATION DISCLOSED TO NONMEMBER EMPLOYEES UNDER THE MEA PROCEDURE SATISFIES THE "AUDITING REQUIREMENT" SET FORTH IN *HUDSON*

The threshold obligation that *Hudson* imposes upon an exclusive representative that seeks to collect service fees is to provide all nonmember employees with "*an adequate explanation* of the basis for the fee." 475 U.S. at 310 (emphasis added). *See id.* at 306 (nonmembers must "be given sufficient information to gauge the propriety of the union's fee"); *id.* (it is inadequate to "leav[e] the nonunion employees in the dark about the source of the figure for the agency fee").

The Court in *Hudson* also specified the information that unions must distribute to nonmember employees in order to meet this requirement. The Court initially stated that a union must "identify[] the expenditures for collective bargaining and contract administration that [are] provided for the benefit of nonmembers as well as

members—and for which nonmembers as well as members can fairly be charged a fee." *Id.* at 306-07. In subsequent footnotes, the Court elaborated on this general standard, first characterizing the union's obligation to provide information to nonmember employees as a "limited notice requirement" that should not impose an "undue burden" on the union, *id.* at 306 n.17, and then stating that a union "need not provide nonmembers with an exhaustive and detailed list of all its expenditures," *id.* at 307 n.18. *See id.* (there necessarily exist "practical reasons why '[a]bsolute precision' in the calculation of the charge to nonmembers cannot be 'expected or required' ") (quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), and *Abood*, 431 U.S. at 239-40 n.40). Finally, and of particular relevance here, the Court noted that "adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." 475 U.S. at 307 n.18.

A. The financial information disclosed to nonmember employees under the MEA Procedure clearly satisfies these standards. By its own terms, the MEA Procedure requires the associations to "provide to all non-union employees who are required to pay an agency fee adequate information identifying the NEA's, MEA's and local associations' total expenditures for the [relevant] fiscal year sufficient to enable them to assess the propriety of the service fee calculation," App. at 112a, including—for NEA, MEA, and FFA—a list of expenditures, broken down by major category, that is verified by an independent auditor. As the District Court expressly found, "[t]he independent auditor will verify the amount of expenditures that were made in both chargeable and nonchargeable areas." App. at 73a. Although the courts below acknowledged that "the auditor will not make the legal determination of which expenditures are chargeable or nonchargeable," they nonetheless concluded that the MEA Procedure complies with the auditing requirement set forth in footnote 18 of *Hudson* because the auditor

will "verify that the expenditures were actually made in the categories determined by the [associations] to be chargeable or nonchargeable." *Id.* *See id.* at 2a, 74a (finding that "an independent auditor, at the audit stage, [will] verify the union's *calculations* and *disbursements* which have been presented to the nonmember") (emphasis in original).

B. Petitioners challenge this ruling on two grounds. First, they assert that the MEA Procedure "provide[s] for verification of neither the calculations nor expenditures after the MEA determines whether they are chargeable or not." Petition at 10. With this argument, however, petitioners are merely seeking to relitigate the factual questions decided below. As noted previously, the District Court found that the independent auditor under the MEA Procedure "will verify the amount of expenditures that were made in both chargeable and nonchargeable areas" and "will verify the union's calculations and disbursements which have been presented to the nonmember." App. at 73a-74a (emphasis omitted). These findings were expressly upheld by the Court of Appeals. App. at 2a. Although petitioners obviously disagree with these factual findings of the courts below, that disagreement does not warrant review by this Court.

Second, petitioners contend that the single reference in footnote 18 of *Hudson* to "verification by an independent auditor" creates a constitutional requirement that the auditor determine whether the associations correctly categorized their expenditures as legally chargeable and legally nonchargeable. Thus, according to petitioners, the courts below erred when they concluded "that an auditor cannot verify a union's calculation of the chargeable and nonchargeable nature of its expenses, because that 'would have the auditor making a legal, not an accounting, decision.'" Petition at 11. But this ruling by the courts below not only is plainly correct, but also is fully consistent with the conclusion of every appellate court that has considered the issue.

The primary purpose behind *Hudson*'s notice requirement is to ensure that a nonmember employee has sufficient information to decide whether or not to object to the amount of the service fee. In order to make this decision, the Court in *Hudson* indicated that the nonmember employee should be provided with two types of information. First, the nonmember needs financial information that sets forth the actual amount of expenditures in each of the union's "major categories of expenses," which information the Court stated should be verified by an independent auditor to ensure its accuracy. 475 U.S. at 307 n.18. In addition, the nonmember needs to know which major categories of expenses, and what amounts within these categories, the union believes to be lawfully chargeable to objecting nonmember employees—*i.e.*, the union should "identif[y] the expenditures for collective bargaining and contract administration that [are] provided for the benefit of nonmembers as well as members —and for which nonmembers as well as members can fairly be charged a fee." *Id.* at 306-07. With this information in hand, the nonmember will be able to make an informed decision on whether to object to the amount of the service fee being charged by the union.[5]

Thus, notwithstanding petitioners' argument to the contrary, there is nothing in footnote 18 of the *Hudson* decision to suggest that an independent auditor is required to verify the union's breakdown between legally chargeable and legally nonchargeable expenditures. In-

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[5] To be sure, the obligation imposed on a nonmember who decides to file an objection to the amount of the fee should not be burdensome. That is why, after receiving the required information, the nonmember who wants to object to the fee is merely required "to make his objection known." 475 U.S. at 306 n.16. *See supra* at 4 (discussing the minimal obligation of a nonmember under the MEA Procedure). And the information needed to make such a general objection is obviously much less than would be the case if the objector were required to specify the basis for his or her objection or to identify particular expenditures to which he or she objects.

deed, such an interpretation of footnote 18 makes no sense, inasmuch as it would require a *financial* expert (*i.e.*, the independent auditor) to make a *legal* judgment (*i.e.*, the determination of which expenditures are chargeable to objecting nonmember employees).[6] It is precisely

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[6] Petitioners apparently agree that "accountants do not make legal decisions," but nonetheless argue that auditors "often review statutes and case law to evaluate clients' legal positions in accounting matters." Petition at 11-12 (emphasis omitted) (citing *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984), and *Thor Power Tool Co. v. Commissioner*, 439 U.S. 522 (1979)). But this argument is misdirected, and these alleged precedents have no relevance in the present context. As petitioners concede, an auditor's familiarity with legal positions is limited to "accounting matters," Petition at 11, and does not extend to legal questions involving other matters, such as public-sector labor relations. *See, e.g., Arthur Young*, 465 U.S. at 812 (auditors merely obliged to analyze corporation's "reserve account for contingent tax liabilities" in light of "relevant [Internal Revenue] Code provisions, Treasury Regulations, Revenue Rulings, and case law"). This limitation on the professional competence of auditors is an accepted part of the accounting profession, and is commonly recognized by learned treatises in the field. *See, e.g.*, American Institute of Certified Public Accountants, Statement on Auditing Standards § 337.06 ("[a]n auditor ordinarily does not possess legal skills and, therefore, cannot make legal judgments concerning information coming to his attention"); *id.* § 110.03 ("The professional qualifications required of the independent auditor are those of a person with the education and experience to practice as such [and] do not include those of a person trained for or qualified to engage in another profession or occupation. For example, . . . [an auditor] does not purport to act in the capacity of a lawyer and may appropriately rely upon the advice of attorneys in all matters of law."); *Montgomery's Auditing* at 22-23 (10th ed. 1985) ("The expertise of most auditors is limited to law and regulations that are financial in nature, . . . [and] [a]uditors generally do not have the background and training to evaluate the degree to which an enterprise conforms to the myriad other laws and regulations that are part of modern society."). Auditors therefore are neither qualified nor capable of verifying a union's breakdown between legally chargeable and legally nonchargeable expenditures, and any opinions that they may express about these matters (assuming, *arguendo*, that auditors could be found to undertake such tasks) would be wholly unreliable and ultimately misleading to nonmember employees.

for this reason that the position urged by petitioners in this case has been uniformly rejected by every federal and state appellate court that has directly addressed the issue. *See Gwirtz*, 887 F.2d at 682 n.3 (quoted *supra* at 7); *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987); *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987); *Andrews v. Education Association of Cheshire*, 829 F.2d 335 (2d Cir. 1987);[7] *Ping v. NEA*, 870 F.2d 1369, 1374 (7th Cir. 1989); *Gilpin v. AFSCME*, 875 F.2d 1310, 1316 (7th Cir.), *cert. denied*, 110 S. Ct. 278 (1989); *Antry v. Illinois Educational Labor Relations Board*, 552 N.E.2d 313, slip op. at 26, No. 4-88-0314 (Ill. Ct. App. 1990). *See also Dashiell v. Montgomery County*, 731 F. Supp. 1251 (D. Md. 1990); *Hudson v. Chicago Teachers Union*, 699 F. Supp. 1334, 1342 (N.D. Ill. 1988); *Lowary v. Lexington Local Bd.*

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[7] In *Andrews*, plaintiffs attacked the adequacy of the financial information provided to nonmember employees by the Connecticut Education Association and NEA, arguing, as do petitioners in this case, that "it does not provide for an independent audit of the breakdown of expenditures to each major category of chargeable activities, even though it does provide for independent verification of the past-year's expenditures." 829 F.2d at 339. The Second Circuit unanimously rejected this argument, reasoning as follows:

> [The nonmembers'] claim that *Hudson* requires that both the union's expenditures and its allocation of expenses to chargeable and nonchargeable categories be audited turns on an interpretation of the purpose of an audit. [The nonmembers'] approach to this problem would have the auditor making a legal, not an accounting, decision regarding the appropriateness of the allocation of expenses to the chargeable and nonchargeable categories. We believe, however, that *Hudson*'s auditor requirement is only designed to ensure that the usual function of an auditor is fulfilled. That usual function is to ensure that the expenditures which the union claims it made for certain expenses were actually made for those expenses. The union's plan satisfies this requirement. The [nonmembers'] interpretation of *Hudson*'s auditing requirement is overly broad because it seeks to have the auditor function both as an auditor in the traditional sense and as the independent decisionmaker as to chargeable expenses. [*Id.* at 340.]

of Education, 704 F. Supp. 1456, 1460-63 (N.D. Ohio 1988), *appeal pending on other grounds*, No. 88-4191; *Cramer v. Matish*, 705 F. Supp. 1234, 1237-38 (W.D. Mich. 1988), *appeal pending*, Nos. 89-1885 & 89-2077; *Gillespie v. Willard City Bd. of Education*, 700 F. Supp. 898, 902 (N.D. Ohio 1987); *Hohe v. Casey*, 695 F. Supp. 814, 820 (M.D. Pa. 1988), *aff'd*, 868 F.2d 69 (3d Cir.), *cert. denied*, 110 S. Ct. 144 (1989).

Notwithstanding this overwhelming body of consistent precedent, petitioners assert that "the decisions of the lower courts are in conflict as to the nature of the independent verification required by *Hudson*." Petition at 20. This assertion, however, is patently frivolous.

First, petitioners contend that the decisions of the Sixth Circuit in *Tierney* and *Damiano* require an independent auditor to verify the union's breakdown between legally chargeable and legally nonchargeable expenditures, thus creating an *intra*-circuit conflict between those decisions and the Sixth Circuit's more recent decisions in *Gwirtz* and the instant case. But even assuming for the sake of argument that an internal conflict among decisions of the Sixth Circuit would provide a basis for this Court's review, the Sixth Circuit has expressly and emphatically rejected—in both *Gwirtz* and in the instant case—petitioners' interpretation of its prior decisions in *Tierney* and *Damiano*. In *Gwirtz*, for example, the Sixth Circuit stated that *Tierney* and *Damiano* "merely recited and then applied the standards in *Hudson*," and thus if a union's financial disclosures "satisfy the constitutional requirements of *Hudson*, the disclosures are also constitutionally sufficient under *Damiano* and *Tierney*." 887 F.2d at 682. And in this case, the court reiterated its holding in *Gwirtz* that nothing in its prior decision in *Tierney* could be read to "require the independent auditor to make a determination of chargeability, which is essentially a legal determination." App. at 3a. Indeed, the court in this case noted specifically that "[u]pon suggestion that

Gwirtz was inconsistent with *Tierney* with respect to this issue, the court considered a petition for rehearing en banc and declined to rehear *Gwirtz*." App. at 3a.

The only other case petitioners rely upon to demonstrate an alleged "conflict" among the lower courts is *Hohe v. Casey*, 727 F. Supp. 163 (M.D. Pa. 1989), but this reliance also is misplaced. Although at one point in its opinion the district court in *Hohe* stated that *Hudson* requires an auditor to verify the "breakdown between chargeable and nonchargeable costs," *id.* at 167, the court clearly did not understand *Hudson* to require, as part of that verification, that the auditor make the legal determination of what expenses are legally chargeable and legally nonchargeable. To the contrary, the court in *Hohe* expressly referred to the Sixth Circuit's decision in *Gwirtz* as a case in which the union had provided nonmember employees with a sufficient "audi[t] [of] the breakdown of chargeable and non-chargeable expenses," *id.* at 166, and specifically noted that "[t]he verification must be what an accountant would do when undertaking an audit," *id.* Thus, far from creating a conflict among prior decisions, the decision in *Hohe* expressly agreed with the holding of the Sixth Circuit in *Gwirtz* (as expressly reaffirmed in the instant case), that "*Hudson*'s auditor requirement is only designed to ensure that the usual function of an auditor is fulfilled"—*i.e.*, "to insure that the expenditures which the union claims it made for certain expenses were actually made for those expenses." 727 F. Supp. at 166 (quoting, with approval, from the decision of the Second Circuit in *Andrews*, 829 F.2d at 340).

In short, consistent with all lower court decisions, the Court of Appeals in this case correctly concluded that the MEA Procedure satisfies the requirement in *Hudson* that a union provide nonmembers with "an adequate explanation" of the service fee that includes "the major categories of expenses, as well as verification by an independ-

ent auditor." 475 U.S. at 307 n.18, 310. Accordingly, the decision below does not merit further review by this Court.[8]

II. THE SELECTION OF AN EXPERIENCED LABOR ARBITRATOR BY THE AAA SATISFIES THE "IMPARTIAL DECISIONMAKER" REQUIREMENT SET FORTH IN *HUDSON*

In *Hudson*, this Court also held that objecting nonmember employees must be provided with an "opportunity to challenge the amount of the fee before an impartial decisionmaker," 475 U.S. at 310, and that "expeditious arbitration" would be sufficient for this purpose "so long as the arbitrator's selection did not represent the Union's unrestricted choice," *id.* at 308 n.21. To meet this requirement, the MEA Procedure utilizes the AAA Rules for Impartial Determination of Union Fees, pursuant to which the AAA is given the task of selecting an experienced labor arbitrator to hear any challenges to the amount of the service fee charged by FFA and other local affiliates of MEA and NEA. Although petitioners contend that the use of the AAA to select an arbitrator is constitutionally unacceptable, their arguments do not warrant further review by this Court.

In *Hudson*, after noting that selection of the impartial decisionmaker should not "represent the Union's unre-

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[8] As previously noted, in rejecting petitioners' challenge to the auditing component of the MEA Procedure, the Court of Appeals relied upon its previous decision in *Gwirtz*, App. at 3a, which involved the identical issue. A petition for certiorari was filed in *Gwirtz*, and that petition was pending when the Petition for a Writ of Certiorari was filed in the instant case. Petitioners acknowledge the relationship between the two cases, and indeed urge this Court "to grant certiorari in both and consider the cases together." Petition at 24. On April 16, 1990, however, this Court concluded that the issue presented in *Gwirtz* did not warrant further review and denied the petition for certiorari in that case. 110 S. Ct. 1810 (1990). Inasmuch as the instant Petition presents precisely the same auditing issue, the Court should likewise deny certiorari here.

stricted choice," 475 U.S. at 308 n.21, this Court referred to two treatises on labor arbitration to explain how the "selection of an arbitrator frequently does not represent one party's unrestricted choice," *id.* (citing F. Elkouri & E. Elkouri, *How Arbitration Works* 135-37 (4th ed. 1985), and O. Fairweather, *Practice and Procedure in Labor Arbitration* 79-90 (2d ed. 1981)). Both of those sources discuss and approve use of the AAA to select an impartial decisionmaker from a list of arbitrators expert in labor relations. *See, e.g.*, Fairweather at 82-85 ("[a] common method of selecting an arbitrator is an agreement to utilize the services of an impartial agency, usually either the American Arbitration Association or the Federal Mediation and Conciliation Service").

Consistent with the guidance provided by this Court in *Hudson*, the lower federal courts that have considered the issue uniformly have held that the impartial decisionmaker requirement of *Hudson* is satisfied by using the AAA, pursuant to its Rules for Impartial Determination of Union Fees, to select an arbitrator to hear challenges to the amount of the service fee. *See, e.g.*, *Ping v. NEA*, 870 F.2d 1369, 1374 (7th Cir. 1989); *Damiano v. Matish*, 830 F.2d 1363, 1371-72 (6th Cir. 1987); *Andrews v. Education Association of Cheshire*, 829 F.2d 335, 340-41 (2d Cir. 1987); *Crawford v. ALPA*, 870 F.2d 155, 160-61 (4th Cir. 1989), *vacated and rehearing en banc granted on other grounds*, No. 88-2083; *Lowary v. Lexington Local Bd. of Education*, 704 F. Supp. 1430, 1447-48 (N.D. Ohio 1987), *aff'd on reconsideration*, 704 F. Supp. 1456, 1468 (N.D. Ohio 1988), *appeal pending on other grounds*, No. 88-4191; *Gillespie v. Willard City Bd. of Education*, 700 F. Supp. 898, 904-05 (N.D. Ohio 1987); *Kidwell v. Transportation Communications Int'l Union*, 731 F. Supp. 192, 204 (D. Md. 1990).

Notwithstanding the unanimous view of the lower federal courts with regard to this issue, petitioners contend that the MEA Procedure is constitutionally inadequate

because it does not provide for "mutual selection" of the impartial decisionmaker, and because the AAA is structurally biased against nonmember employees. Neither of these conditions, however, merit further review.

To begin with, *Hudson* requires only that "the arbitrator's selection [does] not represent the Union's unrestricted choice," 475 U.S. at 308 n.21, and there is nothing in the opinion of the Court to suggest that there must be "mutual selection." Indeed, the portion of the Elkouri treatise cited by the Court expressly states that a labor dispute can be resolved by the "direct appointment of the arbitrator by [an outside] agency, [such as] the AAA." Elkouri at 136.

It would, moreover, be functionally impossible for the MEA Procedure to provide for the "mutual selection" envisioned by petitioners. Such a selection process is premised on the existence of only two parties to the arbitration who could mutually agree on the naming of an arbitrator, or who could alternatively strike names from a list of arbitrators. The MEA Procedure, in contrast, provides for the holding of one consolidated hearing for all objecting nonmember employees during each service-fee year—an aspect of the MEA Procedure that was approved by the District Court and that has not been challenged on appeal. Experience indicates that numerous employees—who are unlikely to be represented by the same counsel—will be participating in the hearing, and therefore no single representative would have the authority to select an arbitrator on behalf of all objecting nonmembers. This is precisely why the MEA Procedure relies on the AAA to appoint the impartial arbitrator.

Nor is petitioners' cause advanced by their unsupported allegation that the AAA is inherently biased against nonmember employees. Even assuming for the sake of argument that the AAA as an organization is somehow

"biased" against nonmember employees,[9] such bias would

[9] Petitioners' argument that the AAA is inherently biased against nonmember employees borders on the absurd. The AAA is a well-respected, nonprofit organization that offers its administrative services to interested parties in an effort to encourage the resolution of disputes through arbitration. As the Elkouri treatise notes, the AAA "is an administrative agency solely, never acting as arbitrator. It maintains panels from which arbitrators may be selected, and it provides administrative personnel and procedures for cases being arbitrated under its rules." Elkouri at 21.

In any event, the "evidence" submitted by petitioners in this case merely attempts to impugn the integrity of the AAA as an institution, and ultimately says nothing about the impartiality of any particular arbitrator selected by the AAA. For example, petitioners claim that the AAA's Board of Directors includes union officers and union attorneys. *See* Petition at 16. In no conceivable way, however, could union representation among the 120 members of the AAA Board of Directors be equated with the selection of biased arbitrators by the AAA. As the "evidence" submitted by petitioners demonstrates, the Board of Directors itself plays no role whatsoever in selecting arbitrators—that function is reserved to various case administrators who are employed in national headquarters or regional offices of the AAA. *See* Deposition of Robert Coulson, President of the AAA, at 19-20.

Petitioners also complain about union involvement in the development of the AAA Rules. *See* Petition at 17. But the Court in *Hudson* made clear that primary responsibility for implementing a constitutional procedure for collecting service fees falls squarely on any exclusive bargaining representative that seeks to collect such fees. Given this responsibility, the associations and other unions quite properly commented on the draft rules circulated to interested parties by the AAA, and offered concrete suggestions on how to improve those rules. At the same time, nonunion employees and their representatives, including the National Right to Work Legal Defense Foundation, also were involved in the development process. *See* Deposition of Robert Coulson, President of the AAA, at Exhibits 8-9. In the final analysis, however, the process by which the AAA Rules were drafted is essentially irrelevant: the constitutionality of the AAA Rules depends not on how those rules were developed, but on whether the method for selecting arbitrators pursuant to those rules complies with the guidelines for selecting an impartial decisionmaker under *Hudson*.

Indeed, although we are unaware of the identity of the arbitrators on the special panel of experienced labor arbitrators established

not be controlling on the question whether a particular arbitrator selected by the AAA is actually biased against nonmember employees who challenge the amount of their service fees. That question—which is ultimately dependent on the pecuniary interest or personalized animus of a particular arbitrator selected by the AAA—is dealt with sufficiently by AAA Rule 4, which provides for the disqualification of any arbitrator who actually may be biased against a party to the arbitration. And petitioners have not even attempted to show that any particular arbitrator serving as an impartial decisionmaker under the AAA Rules has been unable to function in an unbiased manner. *See generally Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 821 (1986) (holding that "allegations of bias or prejudice" can serve as the basis for constitutionally required disqualification "only in the most extreme of cases"); *Horton Joint School District No. 1 v. Hortonville Education Association*, 426 U.S. 482, 493 (1976) (noting that principles of due process are not violated merely because an adjudicator "has taken a position, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances' ").

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under the AAA Rules, the AAA has indicated that they are individuals "who seem to be particularly well accepted . . . in the labor field," and "who seem to be competent to understand these types of issues and to write an opinion that would stand up in court. In effect, its a blue ribbon panel from [the AAA's] . . . overall labor panel." *See* Deposition of Robert Coulson at 132-33. Far from being suspicious of such a panel of experts, petitioners should be pleased to know that the arbitrators chosen by the AAA will possess the expertise necessary to examine, and if necessary to challenge, the expenditures made by any union collecting service fees.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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